

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte Miller

Appeal No. _____

Appellant: Charles A. Miller
Serial Number: 10/680,364
Filed: October 7, 2003
Art Unit: 3651
Examiner: Rakesh Kumar
Title: CARTON WITH DISPENSER
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Cincinnati, Ohio 45202

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

BRIEF ON APPEAL

This brief is in furtherance of Appellant's Notice of Appeal filed December 4, 2008, appealing the decision of the Examiner dated October 16, 2008, finally rejecting claims 1-3, 6-29, 32-47, 50-60, and 62-84. A copy of the claims appears in the Appendix to this brief.

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I. Real Party in Interest

The real party in interest is The C. W. Zumbiel Company, of Cincinnati, Ohio, which is the assignee of the present invention.

II. Related Appeals and Interferences

There are no related appeals or interferences known to Appellant or Appellant's legal representative that will directly affect or be directly affected by the decision of the Board in the present appeal.

III. Status of the Claims

Claims 1-54 were originally filed in the Application. Claims 55-67 were added in a Preliminary Amendment filed February 4, 2005. Claims 68-78 were added in another Preliminary Amendment filed November 4, 2005. Claims 79-84 were added in an Amendment filed August 15, 2007. Claims 4, 5, 30, 31, 48, 49, and 61 have been cancelled. Thus, claims 1-3, 6-29, 32-47, 50-60, and 62-84 remain pending in the Appellant's application. Claims 1-3, 6-11, 14, 15, 17-29, 32, 33, 35-39, 43-47, 51, 53-59, 63-67, 70, 71, 73, 74, and 76-84 stand rejected under 35 U.S.C. § 102(b) as being anticipated by French Patent No. FR2761342A1 to Sylvie ("Sylvie"). Claims 12, 40, 50, 60, and 72 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of U.S. Patent No. 4,558,816 to Wood ("Wood"). Claims 13 and 41 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of Wood and in further view of U.S. Patent No. 5,348,219 to Brintazzoli ("Brintazzoli"). Claims

16, 34, 42, 52, 62, 68, 69, and 75 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie apparently in view of the knowledge of one of ordinary skill in the art. All of the pending claims 1-3, 6-29, 32-47, 50-60, and 62-84 are the subject of this appeal.

IV. Status of Amendments

There have been no amendments filed after the rejection mailed on October 16, 2008.

V. Summary of Claimed Subject Matter

Independent claim 1 is directed to a carton (10) for containing a plurality of articles having a bottom wall (20) spaced from a top wall (16), a pair of spaced side walls (14, 18), and a pair of spaced ends walls, wherein the side and end walls extend between the top and bottom walls (16, 20). (Application at Paragraphs [0031-0032]; Figs. 2-5). A plurality of flaps (40, 42, 44, 46) extends from at least some of the walls (14, 16, 18, 20) and a combination of the flaps (40, 42, 44, 46) form the end walls. (Id.). A corner of the carton (10) is formed by one of the end walls and either the top wall (16) or the bottom wall (20). (Figs. 2-5). Additionally, the carton (10) includes a dispenser portion for dispensing articles from the carton (10). (Application at Paragraph [0034]; Figs. 2-5). In this regard, the dispenser portion is defined by at least one tear line (60, 62) formed in more than one of the flaps (40, 42, 44, 46) and at least in part from the corner so as to define a dispenser opening for exposing an article for removal from the

carton. (Id.). A finger hole (58) for grasping the dispenser portion may be located opposite the corner and at least in part in the bottom wall (20). (Id.). The dispenser portion does not include either of the side walls (14, 18) and the flap (46) extending from the bottom wall (20) is at least one of the flaps through which the tear line is formed. (Id.).

Independent claim 19 is directed to a carton (10) for containing a plurality of articles having a plurality of walls including a bottom wall (20) spaced from a top wall (16), a pair of spaced side walls (14, 18), and a pair of spaced ends walls, wherein the side and end walls extend between the top and bottom walls (16, 20). (Application at Paragraphs [0031-0032]; Figs. 2-5). A plurality of flaps (40, 42, 44, 46) extends from at least some of the walls (14, 16, 18, 20) and a combination of the flaps (40, 42, 44, 46) form the end walls. (Id.). A corner of the carton (10) is formed by one of the end walls and one of the top or bottom walls (16, 20). (Figs. 2-5). Additionally, the carton (10) includes a dispenser portion for dispensing articles from the carton (10). (Application at Paragraph [0034]; Figs. 2-5). In this regard, the dispenser portion is defined by at least one tear line (60, 62, 64, 66, 68) formed in more than one of the flaps (40, 42, 44, 46) and at least in part from the corner so as to define a dispenser opening for exposing an article for removal from the carton (10). (Id.). A handle opening (56) is formed in the top wall (16) and the dispenser portion is adapted to be releasably inserted into the handle opening (56) to maintain access through the dispenser opening to the articles in the carton (10). (Application at Paragraphs [0033] and [0035]; Figs. 2-5). The

dispenser opening extends substantially the entire height of the one end wall. (Figs. 2-5).

Independent claim 37 is directed to a carton (10) for containing a plurality of articles having a plurality of walls including a bottom wall (20) spaced from a top wall (16), a pair of spaced side walls (14, 18), and a pair of spaced end walls, wherein the side and end walls extend between the top and bottom walls (16, 20). (Application at Paragraphs [0031-0032]; Figs. 2-5). A plurality of flaps (40, 42, 44, 46) extends from at least some of the walls (14, 16, 18, 20) and a combination of the flaps (40, 42, 44, 46) form the end walls. (Id.). A corner of the carton is formed by one of the end walls and the top wall (20). (Figs. 2-5). Additionally, the carton (10) includes a dispenser portion hingedly attached to the top wall (16) for dispensing articles from the carton (10). (Application at Paragraph [0034]; Figs. 2-5). In this regard, the dispenser portion is defined by at least one tear line (60, 62, 64, 66, 68) formed in more than one of the flaps (40, 42, 44, 46) and at least in part from the corner so as to define a dispenser opening for exposing an article for removal from the carton (10). (Id.). The dispenser portion does not include either of the side walls (14, 18) and is confined to one end wall and the top wall (16). (Application at Paragraph [0035]; Figs. 2-5). The dispenser opening extends substantially the entire height of the one end wall. (Figs. 2-5). A finger hole (58) is located at least in part in the bottom wall (20) for grasping the dispenser portion. (Application at Paragraph [0034]; Figs. 2-5). Moreover, a pair of retaining panels (40c, 44c) are adjacent the dispenser opening in the end wall to retain

the remaining articles in the carton (10). (Application at Paragraph [0035], Fig. 2-5).

Each panel (40c, 44c) is positioned adjacent to one of the side panels (14, 18).

Independent claim 43 is directed to a package having an article group formed of at least one tier of cylindrical articles disposed on their sides in a side-by-side parallel fashion. (Application at Paragraph [0030]; Figs. 2-5). A carton (10) is disposed around the article group. The carton (10) has a plurality of walls including a bottom wall (20) spaced from a top wall (16), a pair of spaced side walls (14, 18), and a pair of spaced end walls, wherein the side and end walls extend between the top and bottom walls (16, 20). (Application at Paragraphs [0031-0032]; Figs. 2-5). A plurality of flaps (40, 42, 44, 46) extends from at least some of the walls (14, 16, 18, 20) and a combination of the flaps (40, 42, 44, 46) form the end walls. A corner of the carton (10) is formed by one of the end walls and one of the top and bottom walls (16, 20). (Figs. 2-5). Additionally, the carton (10) includes a dispenser portion for dispensing articles from the carton (10). (Application at Paragraph [0034]; Figs. 2-5). In this regard, the dispenser portion is defined by at least one tear line (60, 62, 64, 66, 68) formed in more than one of the flaps (40, 42, 44, 46) and at least in part from the corner so as to define a dispenser opening for exposing one of the articles for removal from the carton (10). (Id.). A handle opening (56) is formed in the top wall (16) and the dispenser portion is adapted to be releasably inserted into the handle opening (56) to maintain access through the dispenser opening to the articles in the carton (10). (Application at Paragraphs [0033] and [0035]; Figs. 2-5). The dispenser opening extends substantially the entire height of the one end wall. (Figs. 2-5).

Independent claim 51 is directed to a blank (12) for forming a carton (10) having a plurality of serially connected side wall, top wall and bottom wall panels (14, 18, 16, 20) adapted to form a pair of spaced side walls and a top wall and a bottom wall of the carton (10). (Application at Paragraphs [0030-0032]; Figs. 1-5). A plurality of side wall, top wall, and bottom wall flaps (40, 42, 44, 46) are connected to ends of the respective side wall, top wall, and bottom wall panels (14, 18, 16, 20). (Id.). The side wall, top wall, and bottom wall flaps (40, 44, 46, 48) are adapted to form end walls of the carton (10). (Id.). A plurality of tear lines (60, 62, 64, 66, 68) are adapted to form a dispenser opening in the carton (10), the dispenser opening including a corner of the carton formed by the top wall (16) and one of the end walls. (Application at Paragraphs [0034-0035]; Figs. 1-5). The tear lines (60, 62, 64, 66, 68) extend through selected ones of the bottom wall flap (46) and side wall flaps (40, 44). (Id.). A finger hole (58) for initiating the tearing of the carton (10) along the tear lines (60, 62, 64, 66, 68) is located opposite the corner and at least in part in the bottom wall (20). The tear lines (60, 62, 64, 66, 68) do not extend into the side wall panels (14, 18) and the dispenser opening extends substantially the entire height of the one end wall. (Figs. 1-5).

Independent claim 55 is directed to a container having twelve substantially identical cylindrical twelve-ounce beverage cans, each can having a height and a diameter. (Application at Paragraph [0030]; Figs. 2-5). A rectangular paper carton (10) is adapted to contain the twelve cylindrical beverage cans in a row and column arrangement, the row and column arrangement including a top row and a next-to-the-top row. (Id.). The paper carton (10) includes a plurality of walls including a pair of end

walls, a top wall (16), a bottom wall (20), and two side walls (14, 18), wherein the end walls have a height and the top and bottom walls have a length. (Application at Paragraphs [0031-0032]; Figs. 2-5). The paper carton (10) also includes a plurality of flaps (40, 42, 44, 46) extending from at least some of the walls (14, 16, 18, 20), wherein the end walls are formed by combinations of the flaps (40, 42, 44, 46). (Id.). The rectangular paper carton (10) is adapted to enclose the twelve cylindrical beverage cans such that the height of each end wall is about equal to a multiplicity of whole can diameters and the lengths of the bottom and top walls (16, 20) are each about equal to a multiplicity of whole can diameters. (Figs. 2-5). At least one scored line (60, 62, 64, 66, 68) is adapted to form a dispenser opening in one of the end walls. (Application at Paragraph [0034]; Figs. 2-5). The at least one scored line is located in more than one of the flaps such that removal of a portion of the associated end wall defines a retaining panel (40c, 44c) that retains the cylindrical cans in both the top and next-to-the-top rows from falling out of the container when the bottom wall (20) is on a support surface. (Application at Paragraphs [0034-0035]; Figs. 2-5). A finger hole (58) for initiating tearing of the carton (10) along the scored line (60, 62, 64, 66, 68) is spaced from the juncture between the one end wall and the top wall (16). (Id.). The at least one scored line includes a first scored line portion in one of the flaps (40, 42, 44, 46) and a second scored line portion in another flap (40, 42, 44, 46) that overlies the first scored line portion when the one end wall is formed by the combination of flaps (40, 42, 44, 46). (Figs. 1-5).

Independent claim 63 is directed to a carton (10) for containing cylindrical beverage cans arranged in two rows with an equal number of aligned cans in each row and includes a bottom panel (20), top panel (16), and foldably attached adjoining side panels (14, 18). (Application at Paragraphs [0031-0032]; Figs. 2-5). A plurality of flaps (40, 42, 44, 46) extends from at least some of the panels (14, 16, 18, 20). (Id.). A dispensing end wall is formed from a combination of the flaps (40, 42, 44, 46) and have a tear line (60, 62, 64, 66, 68) for forming a container dispenser. The tear line (60, 62, 64, 66, 68) extends in more than one flap (40, 42, 44, 46) and along a juncture between at least one side panel (14, 18) and the top panel (16) to a distance spaced from the dispensing end wall and in the dispensing end wall toward the bottom panel (20). (Application at Paragraphs [0034-0035]; Figs. 2-5). A retaining panel (40c, 44c) is formed in the dispensing end wall adjacent one of the side panels (14, 18) and is defined by the tear line (60, 62, 64, 66, 68) through the dispensing end wall. (Id.). The retaining panel (40c, 44c) has a height such that when the carton (10) is on a support surface and the dispenser is opened, the retaining panel (40c, 44c) prevents the end container in a bottom row from accidentally rolling out of the carton (10). (Id.). The carton (10) further includes an end wall that is opposite from the dispensing end wall. (Figs. 2-5). The tear line (60, 62, 64, 66, 68) includes a first tear line portion in one of the flaps (40, 42, 44, 46) and a second tear line portion in another flap (40, 42, 44, 46) that overlies the first tear line portion when the dispensing end wall is formed by the combination of flaps. (Id.).

Independent claim 65 is directed to a method of opening an enclosed carton (10) containing a plurality of containers in rows, including at least a top row and a bottom row. (Application at Paragraph [0030]; Figs. 2-5). The carton (10) includes a top panel (16), side panels (14, 18), a bottom panel (20), and closed ends formed by combination of flaps (40, 42, 44, 46) extending from at least some of the panels (14, 16, 18, 20), wherein at least one of the ends is an exiting end. (Application at Paragraphs [0031-0032]; Figs. 2-5). A dispenser, which is a unitary structure, is formed in the carton (10) and includes a portion of the top panel (16), portions of more than one of the flaps (40, 42, 44, 46), and the upper portion of the exiting end. (Id.). The dispenser is defined by a tear line (66) extending in the top panel (16) and more than one flap (40, 42, 44, 46) that defines the exiting end. (Id.). At least a portion of the dispenser extends substantially the entire width of the exiting end at a location adjacent a juncture of the exiting end and the top wall (16). (Figs. 2-5). The method includes inserting a person's finger into the carton (10) proximate a juncture between the exiting end and the bottom panel (20) and pulling the dispenser open along the portions of the tear line (60, 62, 64, 66, 68) that extend in the exiting end, portions of more than one flap (40, 42, 44, 46), and the top panel (16). (Application at Paragraphs [0034-0035]; Figs. 2-5).

Independent claim 66 is directed to a carton (10) for containing a plurality of similar cylindrical beverage cans arranged in at least two rows and includes a bottom panel (20), a top panel (16), and foldably attached adjoining side panels (14, 18). (Application at Paragraphs [0030-0032]; Figs. 1-5). A plurality of flaps (40, 42, 44, 46) extends from at least some of the panels (14, 16, 18, 20). (Id.). A dispensing end wall

is formed by a combination of the flaps (40, 42, 44, 46) and a tear line (60, 62, 64, 66, 68) extends through more than one of the flaps (40, 42, 44, 46) for forming a container dispenser such that the cans in the carton (10) are accessible when the container dispenser is removed from the end wall. (Application at Paragraphs [0032-0035]; Figs. 2-5). The removal of the container dispenser is initiated at a portion of the tear line (60, 62, 64, 66, 68) located proximate a juncture of the dispensing end wall and the bottom panel (20). (Id.). The dispenser opening includes a portion of the dispensing end wall at a juncture with the top panel (16). (Id.). A retaining panel (40c, 44c) is formed in the dispensing end wall adjacent one of the side panels (14, 18) and is defined in part by the tear line (60, 62, 64, 66, 68) through the dispensing end wall. (Id.). The retaining panel (40c, 44c) has a height such that when the carton (10) is on a support surface and the container dispenser is removed from the dispensing end wall, the retaining panel (40c, 44c) inhibits the end container in the bottom row from accidentally rolling out of the carton (10). (Application at Paragraph [0035]; Figs. 2-5). The carton (10) further includes an end wall opposite from the dispensing end wall. (Figs. 2-5). The tear line (60, 62, 64, 66, 68) includes a first tear line portion in one of the flaps (40, 42, 44, 46) and a second tear line portion in another flap (40, 42, 44, 46) that overlies the first tear line portion when the dispensing end wall is formed by the combination of flaps (40, 42, 44, 46). (Id.).

Independent claim 74 is directed to a blank (12) for forming a carton (10) having a plurality of serially connected panels adapted to form a pair of spaced side walls (14, 18), a top wall (16), and a bottom wall (20) of the carton (10). (Application at

Paragraphs [0030-0032]; Figs 1-5). A plurality of flaps (40, 42, 44, 46) are each connected to one end of one of the panels (14, 16, 18, 20), wherein selected flaps (40, 42, 44, 46) are adapted to combine to form end walls of the carton (10). (Id.). A plurality of tear lines (60, 62, 64, 66, 68) are adapted to form a dispenser opening in the carton (10), the dispenser opening including a corner of the carton formed by the top wall (16) and one of the end walls. (Application at Paragraphs [0034-0035]; Figs. 1-5). The tear lines (60, 62, 64, 66, 68) extend through more than one of the selected flaps (40, 42, 44, 46) forming the one end wall. (Id.). The dispenser opening extends the full height of the one end wall and the flap (46) extending from the bottom wall (20) is at least one of the flaps through which the tear lines (60, 62, 64, 66, 68) are formed. (Figs. 2-5). The tear lines (60, 62, 64, 66, 68) include a first tear line portion in one of the flaps (40, 42, 44, 46) and a second tear line portion in another flap (40, 42, 44, 46) that overlies the first tear line portion when the one end wall is formed by the combination of flaps (40, 42, 44, 46). (Id.). At least a portion of the dispenser opening extends substantially the entire width of the one end wall at a location adjacent the corner. (Id.).

VI. Grounds of Rejection to be Reviewed on Appeal

1. Whether claims 1-3, 6-11, 14, 15, 17-29, 32, 33, 35-39, 43-47, 51, 53-59, 63-67, 70, 71, 73, 74, and 76-84 were improperly rejected under 35 U.S.C. § 102(b) as being anticipated by French Patent No. FR2761342A1 to Sylvie ("Sylvie").

2. Whether claims 12, 40, 50, 60, and 72 were improperly rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of U.S. Patent No. 4,558,816 to Wood (“Wood”).
3. Whether claims 13 and 41 were improperly rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of Wood and in further view of U.S. Patent No. 5,348,219 to Brintazzoli (“Brintazzoli”).
4. Whether claims 16, 34, 42, 52, 62, 68, 69, and 75 were improperly rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie apparently in view of the knowledge of one of ordinary skill in the art.

VII. Argument

A. Overview

All of the pending claims stand rejected over French Patent No. FR2761342A1 to Sylvie (“Sylvie”), either alone (e.g., the rejections under 35 U.S.C. § 102(b)) or in combination with other prior art documents (e.g., the rejections under 35 U.S.C. § 103(a)). We note that all of the pending independent claims have been rejected as being anticipated by Sylvie. Thus, for the present purposes, the arguments in this brief focus on the improper use of Sylvie as the sole anticipatory reference. In this way, once the impropriety of Sylvie is established, all of the rejections will fall. In

this regard, once the rejection of the independent claims fall, the rejection of the dependent claims must necessarily fall. *See, e.g., Hartness Int'l, Inc. v. Simplimatic Eng'g Co.*, 819 F.2d 1100, 1108, 2 USPQ2d 1826. 1831 (Fed. Cir. 1987). Applicant does not, however, waive the right to present arguments directed specifically to the dependent claims, should that become necessary.

B. Claims 1-3, 6-11, 14, 15, 17-29, 32, 33, 35-39, 43-47, 51, 53-59, 63-67, 70, 71, 73, 74, and 76-84 were improperly rejected under 35 U.S.C. § 102(b) as being anticipated by Sylvie.

Claims 1-3, 6-11, 14, 15, 17-29, 32, 33, 35-39, 43-47, 51, 53-59, 63-67, 70, 71, 73, 74, and 76-84 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Sylvie. Of these claims, claims 1, 19, 37, 43, 51, 55, 63, 65, 66, and 74 are independent claims and constitute the entirety of the independent claims pending in Appellant's application. The rejection of these independent claims should be reversed because the Examiner has misconstrued the teaching of Sylvie to impermissibly reach the claims. The disclosure of Sylvie is directed to an aspect that is far afield from what is recited in the independent claims and whose only connection with Applicant's invention appears to be that it involves a carton having a tear line. More particularly, as discussed in more detail below, Sylvie is directed to the deconstruction of cartons into a relatively flat configuration that facilitates after-use handling. This has nothing to do with a dispenser to facilitate the dispensing of articles carried by a carton or package. Consequently, the application of Sylvie as an anticipatory reference in the instant case is improper and the rejections should be overturned.

Sylvie is in the French language and a machine translation of Sylvie was

provided in an Information Disclosure Statement dated April 23, 2008. Appellant's understanding of Sylvie is based on this machine translation. Sylvie is directed to various carton designs that may be broken down or collapsed back to a relatively flat configuration after use. Sylvie achieves this goal by designing and assembling the carton in such a manner that upon pulling a band portion defined in the carton via suitable tear lines, the carton is capable of conveniently coming apart and collapsing to a relatively flat configuration. Referring to Figs. 10 and 11 of Sylvie, the cardboard blank (32) includes a bottom wall (2) having a longitudinal wall (3) connected on either side thereof by bend lines (34). The bottom and longitudinal walls (2, 3) include flaps (6, 9), respectively, at opposed ends thereof. Each of the bottom wall flaps (6) include scored lines that define a divisible part (12). A finger hole (15) may be provided in bottom wall (2) for initiating separation of divisible part (12) from the remainder of the carton. Each of the longitudinal wall flaps (9) include scored lines (17) that define divisible part (18). One of the longitudinal walls (3) includes a cover (33) connected to an edge thereof by bend line (34). The cover (33) includes a primary panel and a pair of flaps (36) on opposed ends thereof and coupled thereto by bend lines (37). The primary panel also includes a wall (38) connected thereto along bend line (40). Two generally parallel scored lines (42) extend through the primary panel and flaps (36) to define a divisible band (41).

Fig. 11 shows the carton blank (32) when assembled. When assembled, the divisible portions (12, 18) line up with each other and with the divisible band (41) formed on the cover (33). The assembled carton retains its shape by securing the flaps

(6, 9) together. This securement, however, is made on the divisible portions (12, 18). In this way, when the divisible portions (12, 18, 41) are separated from the body of the carton, the attachment points that retain the flaps together are also separated from the carton. Consequently, upon removal of the divisible portions (12, 18, 41), the carton essentially falls apart and takes on a relatively flat configuration.

The Examiner maintains that the scored lines in the carton of Sylvie constitutes a “dispenser”, “dispenser portion”, or “dispenser opening” as is recited in the independent claims of Appellant’s application. Such an interpretation completely ignores the true teaching of Sylvie. [See *Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co.*], 221 USPQ 481, 485 (Fed. Cir. 1984) (“Anticipation requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim.”)

More particularly, the Examiner has completely and impermissibly ignored the absence of a dispenser in the claims and impermissibly uses Sylvie so as to reach the claims. In this regard, the scored lines in the carton of Sylvie are for the purpose of easily collapsing the carton back down to a relatively flat configuration. Once the divisible portions of the carton are removed, the carton is not able to retain its shape or structural integrity as all of the attachment points have also been removed (thus allowing the carton to fall apart).

Such tear lines do not constitute a “dispenser”, “dispenser portion”, or “dispenser opening” as is recited in the claims. For cartons having dispensers, the goal is to provide access to the items inside the carton while simultaneously maintaining the

structural integrity of the carton. Sylvie fails to disclose any such feature. Instead, the divisible portions in Sylvie are configured such that when they are removed from the carton, the carton falls apart. The carton of Sylvie is not able to retain anything inside once the divisible portions are removed therefrom. The scored lines in Sylvie would be totally inoperable as a dispenser for a carton as there no longer exists an assembled carton after the divisible portions are removed nor containers in the carton to be dispensed. How can there be a “dispenser”, “dispenser portion”, or “dispenser opening” when there is no carton and nothing to dispense?

In short, Sylvie is directed to the problem of breaking down cartons after they are used and not for dispensing items contained in the carton. Moreover, the structural features in Sylvie are designed and intended for that purpose and simply cannot be used as a dispenser. [*Scripps Clinic & Research Foundation v. Genetech, Inc.*], 18 USPQ at 1001, 1010 (Fed. Cir. 1991) (“Invalidity for anticipation requires that all of the elements and limitations of the claim are found within a single prior art reference There must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention.”) Clearly, one of ordinary skill in this art would not view Sylvie as disclosing a dispenser, dispenser portion or dispenser opening as recited in these rejected claims. For the above reasons, Appellant fails to see how Sylvie can anticipate any of the independent claims 1, 19, 37, 43, 51, 55, 63, 65, 66, and 74, all of which recite either a dispenser, dispenser portion, or dispenser opening, and respectfully requests that the rejection be overturned.

Claims 2, 3, 6-11, 14, 15, 17, 18, 20-29, 32, 33, 35, 36, 38, 39, 44-47, 53, 54, 56-59, 64, 67, 70, 71, 73, and 76-84 depend from one of the allowable independent claims. Thus, for the reasons provided above, Appellant respectfully requests that the rejection of these claims be overturned as well.

C. Claims 12, 40, 50, 60, and 72 were improperly rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of Wood.

Claims 12, 40, 50, 60, and 72 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of Wood. Each of these claims is a dependent claim ultimately depending from one of the allowable independent claims provided above. Wood is relied upon for purportedly teaching a handle opening in a top wall of the carton. Applicant need not address this reliance as Wood fails to cure the deficiency in the primary reference of Sylvie. Accordingly, for the reasons provided above, the rejection of these claims based on the combination of Sylvie and Wood is improper and Appellant respectfully requests that the rejections be overturned.

D. Claims 13 and 41 were improperly rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of Wood and in further view of Brintazzoli.

Claims 13 and 41 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie in view of Wood and in further view of Brintazzoli. Each of these claims is a dependent claim ultimately depending from one of the allowable independent claims provided above. Brintazzoli is relied upon for purportedly teaching inserting a dispenser portion into the handle opening. Applicant need not address this reliance as Brintazzoli fails to cure the deficiency in the primary reference of Sylvie. Accordingly, for the reasons provided above, the rejection of these claims based on the

combination of Sylvie, Wood and Brintazzoli is improper and Appellant respectfully requests that the rejections be overturned.

E. Claims 16, 34, 42, 52, 62, 68, 69 and 75 were improperly rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie apparently in view of the knowledge of one of ordinary skill in the art.

Claims 16, 34, 42, 52, 62, 68, 69 and 75 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sylvie apparently in view of the knowledge of one of ordinary skill in the art. While the Examiner admits that Sylvie fails to teach a tear line that extends along a juncture between the top wall and one of the side walls, the Examiner is of the view that such a modification would have been obvious to one of ordinary skill in the art. Appellant respectfully asserts that the Examiner has provided no rationale or support for this assertion that one of ordinary skill would position the tear line as in the rejected claims. As such, the rejection is unfounded and improper. Moreover, each of these claims is a dependent claim ultimately depending from one of the allowable independent claims provided above. Accordingly, for all of the reasons provided above, the rejection of these claims based on Sylvie is improper and Appellant respectfully requests that the rejections be overturned.

VIII. Conclusion

In conclusion, Appellant respectfully requests that the Board reverse the Examiner's rejections of all the pending claims and that the application be passed to issue. If there are any questions regarding the foregoing, please contact the undersigned at 513-241-2324. It is believed that no additional fees are due with the

submission of this Brief other than the filing fee. If any other charges or credits are necessary to complete this communication, please apply them to Deposit Account 23-3000.

Respectfully submitted,

WOOD, HERRON & EVANS, L.L.P.

Date: February 4, 2009

By: /Steven W. Benintendi/
Steven W. Benintendi
Reg. No. 56,297

2700 Carew Tower
441 Vine Street
Cincinnati, OH 45202
(513) 241-2324

APPENDIX OF CLAIMS

1. (PREVIOUSLY PRESENTED) A carton for containing a plurality of articles comprising:

a plurality of walls including a bottom wall spaced from a top wall, a pair of spaced side walls and a pair of spaced end walls, the side and end walls extending between the top and bottom walls;

a plurality of flaps extending from at least some of the walls, the end walls being formed by combinations of the flaps;

a corner of the carton formed by one of the end walls and either the top wall or the bottom wall;

a dispenser portion for dispensing articles from the carton, the dispenser portion of the carton being defined by at least one tear line formed in more than one of the flaps and at least in part from the corner to define a dispenser opening for exposing an article for removal from the carton; and

a finger hole for grasping the dispenser portion, the finger hole being located opposite from the corner and at least in part in the bottom wall,

wherein the dispenser portion does not include either of the side walls and the flap extending from the bottom wall is at least one of the flaps through which the tear line is formed.

2. (ORIGINAL) The carton of claim 1 wherein the corner is formed by one of the

end walls and the top wall.

3. (ORIGINAL) The carton of claim 2 wherein the dispenser portion is hingedly attached to the top wall.

4. (CANCELLED)

5. (CANCELLED)

6. (ORIGINAL) The carton of claim 1 wherein the dispenser portion is confined to the end wall and the top wall.

7. (PREVIOUSLY PRESENTED) The carton of claim 1 further comprising:
at least one retaining panel adjacent the dispenser opening to retain the remaining articles in the carton.

8. (ORIGINAL) The carton of claim 7 further comprising a pair of the retaining panels, each of which is positioned adjacent to one of the side panels.

9. (ORIGINAL) The carton of claim 7 wherein a height of the at least one retaining panel is over half of the height of the one end wall.

10. (ORIGINAL) The carton of claim 7 wherein a width of the at least one retaining panel is less than half of the width of the one end wall.

11. (ORIGINAL) The carton of claim 1 wherein the dispenser opening extends substantially the entire height of the one end wall.

12. (ORIGINAL) The carton of claim 1 further comprising:
a handle opening in the top wall.

13. (ORIGINAL) The carton of claim 12 wherein the dispenser portion is adapted to be releasably inserted into the handle opening to maintain access through the dispenser opening to the articles in the carton.

14. (ORIGINAL) The carton of claim 1 further comprising:
a pair of spaced tear lines each extending through the one end wall.

15. (ORIGINAL) The carton of claim 14 wherein each tear line extends to the top wall.

16. (ORIGINAL) The carton of claim 15 wherein each tear line extends along a juncture between the top wall and one of the side walls.

17. (ORIGINAL) The carton of claim 15 further comprising:

a fold line extending through the top panel and joining the tear lines.

18. (ORIGINAL) The carton of claim 1 wherein the dispenser portion remains attached to the carton.

19. (PREVIOUSLY PRESENTED) A carton for containing a plurality of articles comprising:

a plurality of walls including a bottom wall spaced from a top wall, a pair of spaced side walls and a pair of spaced end walls, the side and end walls extending between the top and bottom walls;

a plurality of flaps extending from at least some of the walls, the end walls being formed by combinations of the flaps;

a corner of the carton formed by one of the end walls and one of the top and bottom walls;

a dispenser portion for dispensing articles from the carton, the dispenser portion of the carton being defined by at least one tear line formed in more than one of the flaps and at least in part from the corner to define a dispenser opening for exposing an article for removal from the carton; and

a handle opening in the top wall, the dispenser portion being adapted to be releasably inserted into the handle opening to maintain access through the dispenser opening to the articles in the carton;

wherein the dispenser opening extends substantially the entire height of the one end wall.

20. (ORIGINAL) The carton of claim 19 wherein the dispenser portion does not include either of the side walls.

21. (ORIGINAL) The carton of claim 19 wherein the corner is formed by one of the end walls and the top wall.

22. (ORIGINAL) The carton of claim 21 wherein the dispenser portion is hingedly attached to the top wall.

23. (ORIGINAL) The carton of claim 19 further comprising:

a finger hole for grasping the dispenser portion, the finger hole being located opposite from the corner.

24. (ORIGINAL) The carton of claim 23 wherein the finger hole is located at least in part in the bottom wall.

25. (ORIGINAL) The carton of claim 19 wherein the dispenser portion is confined to the end wall and the top wall.

26. (PREVIOUSLY PRESENTED) The carton of claim 19 further comprising:
at least one retaining panel adjacent the dispenser opening to retain the remaining articles in the carton.

27. (ORIGINAL) The carton of claim 26 further comprising a pair of the retaining panels, each of which is positioned adjacent to one of the side panels.

28. (ORIGINAL) The carton of claim 26 wherein a height of the at least one retaining panel is over half of the height of the one end wall.

29. (ORIGINAL) The carton of claim 26 wherein a width of the at least one retaining panel is less than half of the width of the one end wall.

30. (CANCELLED)

31. (CANCELLED)

32. (ORIGINAL) The carton of claim 19 further comprising:
a pair of spaced tear lines each extending through the one end wall.

33. (ORIGINAL) The carton of claim 32 wherein each tear line extends to the top wall.

34. (ORIGINAL) The carton of claim 33 wherein each tear line extends along a juncture between the top wall and one of the side walls.

35. (ORIGINAL) The carton of claim 33 further comprising:
a fold line extending through the top panel and joining the tear lines.

36. (ORIGINAL) The carton of claim 19 wherein the dispenser portion remains attached to the carton.

37. (PREVIOUSLY PRESENTED) A carton for containing a plurality of articles comprising:

a plurality of walls including a bottom wall spaced from a top wall, a pair of spaced side walls and a pair of spaced end walls, the side and end walls extending between the top and bottom walls;

a plurality of flaps extending from at least some of the walls, the end walls being formed by combinations of the flaps;

a corner of the carton formed by one of the end walls and the top wall;

a dispenser portion hingedly attached to the top wall for dispensing articles from the carton, the dispenser portion of the carton being defined by at least one tear line formed in more than one of the flaps and at least in part from the corner to define a dispenser opening for exposing an article for removal from the carton;

wherein the dispenser portion does not include either of the side walls and is

confined to the one end wall and the top wall;

wherein the dispenser opening extends substantially the entire height of the one end wall;

a finger hole for grasping the dispenser portion, the finger hole being located at least in part in the bottom wall;

a pair of retaining panels in the end wall adjacent the dispenser opening to retain the remaining articles in the carton, each retaining panel being positioned adjacent to one of the side panels.

38. (ORIGINAL) The carton of claim 37 wherein a height of the at least one retaining panel is over half of the height of the one end wall.

39. (ORIGINAL) The carton of claim 37 wherein a width of the at least one retaining panel is less than half of the width of the one end wall.

40. (ORIGINAL) The carton of claim 37 further comprising:
a handle opening in the top wall.

41. (ORIGINAL) The carton of claim 40 wherein the dispenser portion is adapted to be releasably inserted into the handle opening to maintain access through the dispenser opening to the articles in the carton.

42. (ORIGINAL) The carton of claim 37 further comprising:

a pair of spaced tear lines each extending through the one end wall and to the top wall along a juncture between the top wall and one of the side walls; and

a fold line extending through the top panel and joining the tear lines.

43. (PREVIOUSLY PRESENTED) A package comprising:

an article group formed of at least one tier of cylindrical articles disposed on sides thereof in a side-by-side parallel fashion; and

a carton disposed around the articulated group;

the carton comprising:

a plurality of walls including a bottom wall spaced from a top wall, a pair of spaced side walls and a pair of spaced end walls, the side and end walls extending between the top and bottom walls;

a plurality of flaps extending from at least some of the walls, the end walls being formed by combinations of the flaps;

a corner of the carton formed by one of the end walls and one of the top and bottom walls;

a dispenser portion for dispensing the articles from the carton, the dispenser portion of the carton being defined by at least one tear line formed in more than one of the flaps and at least in part from the corner to define a dispenser opening for exposing one of the articles for removal from the carton; and

a handle opening in the top wall, the dispenser portion being adapted to be releasably inserted into the handle opening to maintain access through the dispenser opening to the articles in the carton;

wherein the dispenser opening extends substantially the entire height of the one end wall.

44. (ORIGINAL) The package of claim 43 further comprising:

a retaining panel for inhibiting each of the articles from undesirably exiting the carton when the dispenser opening is exposed.

45. (ORIGINAL) The package of claim 44 further comprising a pair of the retaining panels, each of which is positioned adjacent to one of the side panels.

46. (ORIGINAL) The package of claim 44 wherein the retaining panel is sufficiently high to retain the articles in the uppermost tier of the package in the carton until removed by a user.

47. (ORIGINAL) The package of claim 44 wherein a width of the retaining panel is less than half of the width of the end wall.

48. (CANCELLED)

49. (CANCELLED)

50. (ORIGINAL) The package of claim 43 wherein the article group comprises at least two vertically arranged tiers of cylindrical articles, the articles in each tier being disposed on sides thereof in a side-by-side parallel fashion, opposite ends of each of the articles in the carton being concealed by the side walls when the dispenser opening is exposed.

51. (PREVIOUSLY PRESENTED) A blank for forming a carton comprising:

a plurality of serially connected side wall, top wall and bottom wall panels adapted to form a pair of spaced side walls and a top wall and a bottom wall of the carton;

a plurality of side wall, top wall and bottom wall flaps each connected to ends of the respective side wall, top wall and bottom wall panels, the side wall, top wall and bottom wall flaps adapted to form end walls of the carton;

a plurality of tear lines adapted to form a dispenser opening in the carton, the dispenser opening including a corner of the carton formed by the top wall and one of the end walls, the tear lines extending through selected ones of the bottom wall flaps and the side wall flaps; and

a finger hole for initiating the tearing of the carton along the tear lines forming the dispenser opening, the finger hole being located opposite from the corner and at least in part in the bottom wall,

wherein the tear lines do not extend into the side wall panels, and

wherein the dispenser opening extends substantially the entire height of the one end wall.

52. (ORIGINAL) The blank of claim 51 wherein the tear lines extend along the junctures between the top wall panel and the side wall panels.

53. (PREVIOUSLY PRESENTED) The blank of claim 51 further comprising:
a fold line in the top wall panel spanning a pair of the tear lines.

54. (PREVIOUSLY PRESENTED) The blank of claim 51 further comprising:
a finger hole adjacent to the bottom wall panel and at least one of the tear lines and adapted to commence tearing of the carton along the tear lines to expose the dispenser opening in the carton.

55. (PREVIOUSLY PRESENTED) A container comprising:
twelve substantially identical cylindrical twelve-ounce beverage cans, each can having a height and a diameter;

a rectangular paper carton adapted to contain the twelve cylindrical beverage cans in a row and column arrangement, the row and column arrangement including a top row and a next-to-the-top row;

a plurality of walls including a pair of end walls, a top wall, a bottom wall and two

side walls of the paper carton, the end walls having a height, the top and bottom walls having a length;

a plurality of flaps extending from at least some of the walls, the end walls being formed by combinations of the flaps;

wherein the rectangular paper carton is adapted to enclose the twelve cylindrical beverage cans such that the height of each end wall is about equal to a multiplicity of whole can diameters and the lengths of the bottom and top walls are each about equal to a multiplicity of whole can diameters;

at least one scored line adapted to form a dispenser opening in one of the end walls, the at least one scored line located in more than one of the flaps such that removal of a portion of the associated end wall defines a retaining panel that retains the cylindrical cans in both the top and next-to-the-top rows from falling out of the container when the bottom wall is on a support surface; and

a finger hole for initiating the tearing of the carton along the scored line, the finger hole being spaced from the juncture between the one end wall and the top wall;

wherein the at least one scored line includes a first scored line portion in one of the flaps and a second scored line portion in another flap that overlies the first scored line portion when the one end wall is formed by the combination of flaps.

56. (PREVIOUSLY PRESENTED) The container of claim 55 wherein the at least one scored line extends upwardly toward the top wall such that removal of a portion of the top wall adjacent the at least one scored line results in a dispenser opening at a

junction of the one end wall and the top wall providing access to the beverage cans

57. (PREVIOUSLY PRESENTED) The container of claim 56 wherein the scored line and the dispenser opening each extends substantially the entire height of the one end wall.

58. (PREVIOUSLY PRESENTED) The container of claim 56 wherein at least a portion of the dispenser opening extends substantially the entire width of the one end wall at a location adjacent the juncture of the one end wall and the top wall.

59. (PREVIOUSLY PRESENTED) The container of claim 55 further comprising a pair of the retaining panels in the one end wall, each retaining panel being located adjacent one of the side walls and having a height sufficient to retain the beverage cans in the top row.

60. (PREVIOUSLY PRESENTED) The container of claim 55 wherein the beverage cans are arranged in only two rows with six cans in each row.

61. (CANCELLED)

62. (PREVIOUSLY PRESENTED) The container of claim 56 wherein the dispenser opening includes the entire juncture of the carton between the one end wall and the top

wall.

63. (PREVIOUSLY PRESENTED) A carton for containing cylindrical beverage cans arranged in two rows with an equal number of aligned cans in each row, the carton comprising:

- a bottom panel, top panel and foldably attached adjoining side panels;

- a plurality of flaps extending from at least some of the panels;

- a dispensing end wall formed from combinations of the flaps and having a tear line for forming a container dispenser, the tear line extending in more than one flap and along a juncture between at least one side panel and the top panel to a distance spaced from the dispensing end wall and in the dispensing end wall toward the bottom panel;

- a retaining panel in the dispensing end wall adjacent one of the side panels defined in part by the tear line through the dispensing end wall, the retaining panel having a height such that when the carton is on a support surface and the dispenser is opened the retaining panel prevents the end container in a bottom row from accidentally rolling out of the carton; and

- an end wall opposite from the dispensing end wall,

wherein the tear line includes a first tear line portion in one of the flaps and a second tear line portion in another flap that overlies the first tear line portion when the dispensing end wall is formed by the combination of flaps.

64. (PREVIOUSLY PRESENTED) The carton of claim 63 wherein the retaining panel inhibits the end container in each of the rows from accidentally rolling out of the carton.

65. (PREVIOUSLY PRESENTED) A method of opening an enclosed carton containing a plurality of containers in rows, including at least a top row and a bottom row, the carton having (i) a top panel, side panels, a bottom panel, and closed ends formed by combinations of flaps extending from at least some of the panels, at least one of the ends is an exiting end, and (ii) a dispenser which is a unitary structure comprising a portion of the top panel, portions of more than one of the flaps and the upper portion of the exiting end, said dispenser being defined by a tear line extending in the top panel and more than one flap that defines the exiting end, wherein at least a portion of the dispenser extends substantially the entire width of the exiting end at a location adjacent a juncture of the exiting end and the top wall, the method comprising the steps of:

inserting a person's fingers into the carton proximate a juncture between the exiting end and the bottom panel; and

pulling the dispenser open along the portions of the tear line that extend in the exiting end, portions of more than one flap and the top panel.

66. (PREVIOUSLY PRESENTED) A carton for containing a plurality of similar cylindrical beverage cans arranged in at least two rows, the carton comprising:

a bottom panel, top panel and foldably attached adjoining side panels;

a plurality of flaps extending from at least some of the panels;

a dispensing end wall formed by a combination of the flaps having a tear line extending through more than one of the flaps for forming a container dispenser such that the cans in the carton are accessible when the container dispenser is removed from the end wall;

wherein the removal of the container dispenser is initiated at a portion of the tear line located proximate a juncture of the dispensing end wall and the bottom panel and the container dispenser includes a portion of the dispensing end wall at a juncture with the top panel; and

a retaining panel in the dispensing end wall adjacent one of the side panels defined in part by the tear line through the dispensing end wall, the retaining panel having a height such that when the carton is on a support surface and the container dispenser is removed from the dispensing end wall the retaining panel inhibits the end container in the bottom row from accidentally rolling out of the carton; and

an end wall opposite from the dispensing end wall,

wherein the tear line includes a first tear line portion in one of the flaps and a second tear line portion in another flap that overlies the first tear line portion when the dispensing end wall is formed by the combination of flaps.

67. (PREVIOUSLY PRESENTED) The carton of claim 66 wherein the retaining panel inhibits the end container in each of the rows from accidentally rolling out of the carton.

68. (PREVIOUSLY PRESENTED) The carton of claim 19 further comprising:
a tear line forming the dispenser opening and extending from the top wall to the bottom wall, at least a portion of the tear line being in the end wall.

69. (PREVIOUSLY PRESENTED) The carton of claim 19 wherein the dispenser opening extends the full width of the top wall.

70. (PREVIOUSLY PRESENTED) The carton of claim 27 wherein the retaining panels are spaced from one another.

71. (PREVIOUSLY PRESENTED) The carton of claim 26 wherein the retaining panel is less than the height of the end wall.

72. (PREVIOUSLY PRESENTED) The package of claim 43 wherein the article group comprises at least two vertically arranged tiers of cylindrical articles, the articles in each tier being disposed on sides thereof in a side-by-side parallel fashion.

73. (PREVIOUSLY PRESENTED) The package of claim 45 wherein the retaining panels are spaced from each other.

74. (PREVIOUSLY PRESENTED) A blank for forming a carton comprising:
a plurality of serially connected panels adapted to form a pair of spaced side

walls and a top wall and a bottom wall of the carton;

a plurality of flaps each connected to one end of one of the panels, selected flaps adapted to combine to form end walls of the carton; and

a plurality of tear lines adapted to form a dispenser opening in the carton, the dispenser opening including a corner of the carton formed by the top wall and one of the end walls, the tear lines extending through more than one of the selected flaps forming the one end wall;

wherein the dispenser opening extends the full height of the one end wall,

wherein the flap extending from the bottom wall is at least one of the flaps through which the tear lines are formed,

wherein the tear lines include a first tear line portion in one of the flaps and a second tear line portion in another flap that overlies the first scored line portion when the one end wall is formed by the combination of flaps, and

wherein at least a portion of the dispenser opening extends substantially the entire width of the one end wall at a location adjacent the corner.

75. (PREVIOUSLY PRESENTED) The blank of claim 74 wherein the dispenser opening includes a full width portion of the top wall.

76. (PREVIOUSLY PRESENTED) The blank of claim 74 wherein the tear lines are adapted of form a pair of spaced retaining panels in the one end wall.

77. (PREVIOUSLY PRESENTED) The blank of claim 76 wherein each retaining panel is adjacent one of the side walls.

78. (PREVIOUSLY PRESENTED) The blank of claim 76 wherein each retaining panel extends less than the full height of the one end wall.

79. (PREVIOUSLY PRESENTED) The carton of claim 19 wherein at least a portion of the dispenser opening extends substantially the entire width of the one end wall adjacent the corner.

80. (PREVIOUSLY PRESENTED) The carton of claim 37 wherein at least a portion of the dispenser opening extends substantially the entire width of the one end wall adjacent the corner.

81. (PREVIOUSLY PRESENTED) The package of claim 43 wherein at least a portion of the dispenser opening extends substantially the entire width of the one end wall adjacent the corner.

82. (PREVIOUSLY PRESENTED) The blank of claim 51 wherein at least a portion of the dispenser opening extends substantially the entire width of the one end wall adjacent the corner.

83. (PREVIOUSLY PRESENTED) The carton of claim 4 wherein a portion of the finger hole is located in the bottom wall and the one end wall.

84 (PREVIOUSLY PRESENTED) The blank of claim 54 wherein a portion of the finger hole is located in the bottom wall and the one end wall.

APPENDIX OF EVIDENCE

(None)

APPENDIX OF RELATED PROCEEDINGS

(None)